No. 18538

United States Court of Appeals For the Ninth Circuit

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL NO. 6 OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Appellants,*

v.

NORTHWEST STEEL ROLLING MILLS, INC., a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

DEWITT WILLIAMS
ROBERT H. LORENTZEN
Attorneys for Appellee

ROSLING, WILLIAMS, LANZA & KASTNER
1440 Washington Building
Seattle 1, Washington

METROPOLITAN PRESS AND WESTERN SEATTLE, WASHINGTON

INDEX

Page

Appendices:

TABLE OF CASES

United States Court of Appeals
For the Ninth Circuit

United Steelworkers of America, AFL-CIO, and Local No. 6 of the United Steelworkers of America, AFL-CIO,
Appellants,

v.

Northwest Steel Rolling Mills, Inc., a corporation,
Appellee.

No. 18538

Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Amended and Additional Facts

Appellants' Statement of the Case requires amplification with respect to certain facts and the additional facts and corrections hereinafter noted.

Appellants commence their "Statement of the Case" by erroneously asserting that the summary judgment entered herein was one "denying an action for enforcement of an arbitration award." The judgment actually affirms the arbitration award in respect to those matters as to which the District Court found the arbitrator had jurisdiction. The award was held invalid and unenforceable only with respect to those matters found to be outside the jurisdiction of the arbitrator (R. 90).

In February of 1962, appellants commenced an action in the Superior Court of the State of Washington for King County, under Cause No. 579234 (R. 4). This action was disposed of by execution by appellants and appellee and their attorneys of the stipulation dated February 16, 1962, hereinafter called "February 16 stipulation" (R. 29, 81), which was filed in said action.

Pursuant to the terms of the February 16 stipulation and in line with the settled practice of the appellants and appellee in former arbitration cases, the stipulation dated March 13, 1962, hereinafter called "March 13 stipulation," was executed on behalf of appellants and appellee by their attorneys (R. 9-10, 12-13, 81). This stipulation was transmitted to appellants' attorney by letter reading as follows:

> "The stipulation between us calls for separate stipulations as to each arbitration. I enclose for your attention suggested draft of stipulation with respect to the arbitration before Professor Ross which I believe follows generally the form heretofore agreed upon in matters I have had with Mr. Furman. Please call me after you have had a chance to check this form of stipulation." (R. 82-83.)

The arbitration was held on March 15, 1962. On July 18, 1962, the arbitrator returned to Seattle where he orally announced his decision that the selection of men for tryouts and for positions in the Blooming Mill and Finishing Mill was not in accordance with the labor contract between the parties and then asked the parties to attempt to negotiate an agreement as to the filling of the new positions, in order to terminate the entire controversy.

The arbitrator's decision reads in part as follows:

> "Subsequent to the hearing the Company and Union briefs were received and considered. On July 18, 1962, I held a conference with the representatives of the parties at Seattle. It was my purpose to encourage an agreed upon settlement of the dispute; but, although sustained efforts have been made to achieve this purpose, the parties have not been able to develop a mutually acceptable disposition of the issues." (R. 13, 80-81).

The statement at page 4 in the appellant's brief that "Doctor Ross stated that he could either proceed to formulate an award—granting jobs, indemnification, setting up testing procedures, etc.—, or he could allow the parties to first suggest an agreed formula for filling the jobs" is not supported by the record.

These negotiations failed. The arbitrator was so informed and that it was therefore necessary for him to proceed to decide the matter freed from any of the previous negotiations (R. 13, 81).

In addition to the foregoing, it is important to emphasize that the arbitrator had no legal or factual basis upon which to proceed in allocating jobs and retirement benefits after having decided the limited issues submitted to him by the March 13 stipulation. That the allocation of jobs (a function of management as hereinafter shown) was not before him is demonstrated by several facts. In the first place, not all of the men attended the hearing before the arbitrator (R. 82), and no evidence was offered by the grievants to sustain any claim of "superior ability,"

although in each instance a number of men were involved with respect to each job (R. 82).

The award even went outside certain of the questions to be arbitrated, i.e., whether certain grievants were entitled simply to "try out" for jobs (as distinguished from an outright award of the jobs, or other benefit, as was awarded by the arbitrator) (R. 14-16, 40, 41).

Another and vital fact is that the parties themselves had reserved for later consideration the grievances of a large group of men who were seeking positions in the Finishing Mill (R. 84, 86). The arbitrator was informed of this reservation (R. 84), but nevertheless proceeded to fill certain of these Finishing Mill positions, thus rendering abortive the reserved grievances. In other words, the parties recognized that if the arbitrator found that appellee had in some way proceeded improperly in the selection of the men who were selected, then any subsequent selection process would have to take into consideration the pending grievances of others listed on the April 24, 1962, reservation of arbitration agreement (R. 86).

The awards by the arbitrator were not even made in accordance with the claims of the Union that the men were entitled to placement in accordance with seniority (R. 85). For instance, the issue raised as to Garrioch and Ward was whether they were unjustly denied "tryouts" (as distinguished from outright awards of jobs) (R. 40, 41, 85). They had the highest seniority (of those filing grievances) in the former Rolling Mill Department. However, they were awarded the lowest-rated jobs in the

revised Finishing Mill Division. In addition to answering question No. 2 of the stipulation, the arbitrator awarded the job of Blooming Mill Operator to Flynn, who was junior in seniority to both Issacson and DeLong. The problem is emphasized by the fact that, subsequent to the arbitrator's decision, DeLong filed a grievance protesting the allocation to Flynn of the job of Blooming Mill Operator when Flynn was junior to him (DeLong) in seniority (R. 85).

That the selection of men for positions in the new mill was a right reserved to the appellee is shown by paragraph 2 of the letter of July 7, 1960 (R. 8, p. 42), and Section 1 of Article IX of the labor contract (R. 8, p. 23). Under this article, an important criteria of selection is "(b) ability to perform the work", a determination reserved to appellee under Article 3 of the labor contract, hereinafter quoted at page 13 (R. 8, p. 10).

The District Court found that the questions submitted to the arbitrator were to be answered either in the affirmative or negative. The judgment of the District Court was that the arbitrator had no power or authority to do anything under the stipulation of the parties except to give such affirmative or negative answers to the five questions posed in the March 13 stipulation (R. 20). The reason for this limitation is, of course, that the parties, by their stipulations, had not taken away from the employer its reserved right to make the ultimate job selections, and this intent is further shown by the limited record and proof submitted to the arbitrator which furnished him no basis for making such ultimate job selec-

tions and other beneficial awards (R. 82).

LAW POINTS AND ARGUMENT IN SUPPORT OF JUDGMENT

Summary of Argument

The District Court's Memorandum Decision is an excellent and concise statement of this case and is set forth in full as Appendix A to this brief.

It is appellee's position that summary judgment for it was properly granted. Appellee's argument is presented under the following headings:

I. The District Court Was Correct in Granting Appellee's Motion for Summary Judgment.

A. The Arbitrator's Authority Was Limited to the Authority Conferred Upon Him by the March 13 Stipulation

1. *The Terms of the March 13 Stipulation Are Plain and Unambiguous*

2. *The Labor Contract Does Not Require the Submission of Unsettled Grievances to the Arbitrator*

3. *The Arbitrator's Decision Was Not in Line With the Terms of the Labor Contract*

4. *The District Court Did Not Violate Federal Policy*

B. No Material Issues of Fact Existed

1. *No Material Issue of Fact Was Created or Raised by the Labor Contract, Grievances, Stipulations or Contemporaneous Documents and Statements of the Parties*

2. *No Material Issue of Fact Existed as to Whether*

Appellee Had Waived the Limitations Which Were Placed Upon the Arbitrator's Authority.

ARGUMENT

I. The District Court Was Correct in Granting Appellee's Motion for Summary Judgment

It is the position of the appellee that under the March 13 stipulation the arbitrator had no jurisdiction or power or authority whatsoever to make any decision except to give an affirmative or negative answer to the questions posed, thus remitting the matter of reselections of personnel for the new jobs back to the company under its management functions provided for under Article III of the labor contract between parties and that, therefore, summary judgment for appellee was properly granted.

The arbitrator did specifically answer the questions submitted by the March 13 stipulation by stating in his decision as follows:

> "It therefore follows that the company's actions did violate the basic agreement . . ." (R. 14.)

Everything thereafter decided or purportedly determined or awarded by the arbitrator in said decision was outside his power and jurisdiction (except the one sentence in which he found that the grievances of Stockman and Perfrement were timely filed, these questions having been posed under Paragraph 5 of the March 13 stipulation).

A. The Arbitrator's Authority Was Limited to the Authority Conferred Upon Him by the March 13 Stipulation

1. *The Terms of the March 13 Stipulation Are Plain and Unambiguous*

The March 13 stipulation speaks for itself and clearly restricts the arbitrator to an answer to the questions submitted. The February 16 stipulation states that the separate matters will be submitted, not on the grievances but on separate stipulations, as follows:

> "I. It is agreed that the separate matters involved in paragraphs 1(a), (b) and (c) and 6(a) of said letter shall be submitted to Mr. Arthur Ross for arbitration by him.
>
> "IV. Separate arbitration stipulations shall be submitted to each of the above named arbitrators listing the issues to be considered and determined by them as set forth above." (R. 29.)

The March 13 stipulation was clearly called for by the February 16 stipulation disposing of the King County Cause No. 579234 litigation and the March 13 stipulation as executed was not some ineffectual document as appellants would attempt to make it. It had been the settled practice of the parties in cases under the labor contract here involved to draw arbitration stipulation agreements specifically agreeing upon the issues to be determined by the arbitrator. The March 13 stipulation was drawn and executed therefore because it was both required by the February 16 stipulation and by the settled practice of the parties of defining the specific issues raised by the grievances so that there would be no misunderstanding as to the issues raised or the point or points to be determined (R. 29, 81-82). This is evidenced by the letter of transmittal for the draft of the March 13 stipulation to

appellant's counsel, reading as follows:

> "*The stipulation between us calls for separate stipulations as to each arbitration.* I enclose for your attention suggested draft of stipulation with respect to the arbitration before Professor Ross which I believe *follows generally the form heretofore agreed upon in matters I have had with Mr. Furman.* Please call me after you have had a chance to check this form of stipulation." (R. 82-83.) (Emphasis supplied.)

The following cases are cited in support of appellee's position that the arbitrator's award could not extend beyond the limits of the authority conferred upon him under the terms of the March 13 stipulation:

In *Smith and Wesson, Inc.*, 10 War Labor Reports 148 at page 151 and following the Board in voiding a portion of an arbitration award stated the applicable rules as follows:

> "There are certain well established principles of law and equity which are available to guide the Board by way of analogy in determining the fundamental issues which are presented with respect to this arbitration.
>
> "1. The authority of the arbitrator must be determined from the terms of the submission and 'as in the case of other written instruments each part of the submission must have such effect as is ordinarily accorded the terms used in them. . . .'
>
> "2. The arbitrator's award cannot extend beyond the limits of the authority conferred upon him under the terms of the submission.
>
> "3. The extent of the authority of the arbitrator under the submission is for the court and not for the arbitrator to determine.

"4. If the award of the arbitrator departs from the terms of the submission that portion of the award which constitutes a departure is void.

"5. If a portion of the arbitrator's award departs from the terms of the submission, the award may be sustained as to that portion which is within the frame of reference, if the award is severable and the otherwise valid portion is not affected by the departure.

"6. Courts of law generally regard the invalidity of an arbitrator's award as a bar to an action upon such an award. If the case is one of equity jurisdiction, a court of equity has the power to set aside an invalid award."

In *Textile Workers Union of America v. American Thread Co.*, 291 F.(2d) 894 (4th Cir. 1961), the arbitrator determined that the employee was discharged for cause and ordered reinstatement. The company on challenge to the award contended that the arbitrator's only function was to determine whether good cause for disciplinary action existed and that the determination of the appropriate action to be taken was for management. The Court of Appeals refused to enforce the award and in agreeing with the Company's contention stated (at page 900):

"Neither the contract nor the submission gave the arbitrator any right to disregard established disciplinary practices, consistently applied, and to dispense his own brand of industrial justice."

The court also stated (at page 898):

"It is impossible to overemphasize the terms and conditions of the submission which was the product of agreement between the parties and which was both the source and limit of the arbitrator's authority and power."

In *Local 453, International U. of E., R. & M. Workers v. Otis Elevator Co.*, 201 F. Supp. 213, 215 (D.N.Y. 1962), the court in holding that an arbitrator's award was void and unenforceable because in violation of public policy also stated:

> "As a general rule an arbitrator's decision is not open to judicial review, unless he has exceeded his power by deciding a matter not arbitrable under the contract *or the submission*" (emphasis supplied).

In *Consolidated Vultee Aircraft Corp. v. United Automobile, Aircraft & Agricultural Implement Workers of America, Local 904*, 160 P.(2d) 113 (1945) the court stated:

> "It was the duty of the court to determine from the agreement the extent of the referee's powers and to annul any or all of the provisions of the award as matters which had not been submitted to him for decision."

In *Application of MacMahon*, 63 N.Y.S.(2d) 657 (1946) the court granted a motion to vacate the award of an arbitrator because he had failed to answer all of the questions submitted. In deciding the case, however, the court made statements equally applicable to the issue here since the court emphasized that the arbitrator was limited and bound by the arbitration agreement. The court stated:

> "The submission to arbitration clothed the arbitrator with jurisdiction to hear and determine the specific issues which the parties, by their voluntary agreement, designated as the subjects to be determined by him. The submission is, at one and the same time, the source and definition of the authority to be exercised by the arbitrator."

2. *The Labor Contract Does Not Require the Submission of Unsettled Grievances to the Arbitrator*

Appellants' position that the contract *requires* the submission of unsettled grievances to the arbitrator is untenable. Article XI of the contract provides in part as follows:

> "Section 2. In the event that a grievance shall not have been satisfactorily settled by the Union and the Company, *the case in question* with all records pertaining thereto *can then be* appealed to an arbitrator to be appointed by mutual agreement of the parties hereto. The arbitrator shall render a decision in line with the written terms of the contract and said decision shall be final. * * *" (emphasis supplied) (R. 8, page 28).

The foregoing section which is relied upon by appellants does not in any way make it mandatory that the grievance must be the basis upon which appeal to arbitration is made. The labor contract is silent as to the procedure to be followed when a case in question is appealed to arbitration. Absent procedural direction in the labor contract, it had become the settled practice of the parties to draw arbitration stipulation agreements specifically agreeing upon the issues to be determined by the arbitrator (R. 81-82).

3. *The Arbitrator's Decision Was Not in Line With the Terms of the Labor Contract*

The decision of the arbitrator, even if he had the broad authority contended for by appellants, is not in line with the written terms of the labor contract between the parties. Article III of the labor contract provides as follows:

"Management Functions

"Section 1. The management of the plant and the direction of the working forces and the operations of the plant, including the hiring, promoting and retiring of employees, the suspending, discharging or otherwise disciplining of employees, the layoff and calling to work of employees in connection with any reduction or increase in the working forces, the scheduling of work and the control and regulation of the use of all equipment and other property of the Company, are the exclusive functions of the Management; provided, however, that in the exercise of such functions, the Management shall observe the provisions of this Agreement and shall not discriminate against any employee or applicant for employment because of his membership in or lawful activity on behalf of the Union." (R. 8, pages 10-11).

The designation by the arbitrator of certain employees to fill some of the new jobs was a usurpation of the rights reserved to management. Certainly no ultimate job selection was involved in the arbitration where some of the men did not even attend the hearing and no evidence was offered by the grievants to sustain any claim of superior ability, although in each instance a number of men were involved with respect to each position (R. 82). Thus, the arbitrator's decision went beyond even the broad authority claimed for him by the appellants. The arbitrator was by the terms of the labor contract required to remit the matter of reselections of personnel for tryouts and new jobs back to the appellee.

4. *The District Court Did Not Violate Federal Policy*

The District Court did not violate federal policy or substitute its contract interpretation for that of the ar-

bitrator as alleged by appellants at pages 19-23 of their brief.

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The principle has been enunciated many times. *Drake Bakeries, Inc., v. Local 50, etc.*, 370 U.S. 254, 256 (1962); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

Appellee agreed to arbitrate the separate matters identified in paragraphs 1(a), (b) and (c) and 6(a) of the letter attached to the February 16 stipulation by submitting an arbitration stipulation to the arbitrator listing the issues to be considered and determined by him. This appellee did when it executed the March 13 stipulation (R. 29).

The arbitrator interpreted the labor contract between the parties and based on the evidence presented at the arbitration hearing found that the appellee had violated its terms in selecting personnel for tryouts and new jobs. The arbitrator then went outside the terms of the labor contract and the February 16 and March 13 stipulations and decided that as a matter of law he had the authority to fashion an award (R. 14). Such authority was outside the scope of the March 13 stipulation and the District Court so found and entered judgment accordingly (R. 87-90).

B. No Material Issues of Fact Existed

Appellant contends that material issues of fact existed because:

(a) The labor contract, grievances and March 13 stipulation, read together, create an issue of fact.

(b) Contemporaneous documents and statements of the parties raise an issue of fact.

(c) An issue existed as to whether appellee had waived any right to restrict the arbitrator's authority.

1. *No Material Issue of Fact Was Created or Raised by the Labor Contract, Grievances, Stipulations or Contemporaneous Documents and Statements of the Parties*

As previously noted, the labor contract is silent as to the procedure to be followed when a case in question is appealed to arbitration, and it had become the settled practice of the parties to draw arbitration stipulation agreements specifically agreeing upon the issues to be determined by the arbitrator (R. 81-82).

Appellants omit from their argument, beginning at page 25 of their brief, any reference to the February 16 stipulation. The language of the February 16 and March 13 stipulations is clear and unambiguous. The intent of the employees in preparing their grievances long prior to the appeal to arbitration is not an issue. When cases in question are appealed to arbitration, the employees are represented by their union, appellants herein (R. 8, page 28).

The March 13 stipulation clearly restricts the arbitrator

to an answer to the questions submitted. On its face it is more than a general outline of the categories in which the several different grievances fell. This stipulation was drawn and executed because it was required both by the February 16 stipulation and by the settled practice of the parties (R. 29, 81-82).

The February 16 and March 13 stipulations speak for themselves and provide the answer to the question of what issues were to be considered and determined by the arbitrator and the authority given him by the parties. The intent of the parties is to be found in the language employed and not from gratuitous and self-serving statements. This rule is expressed in *Bellingham Securities Syndicate, Inc., v. Bellingham Coal Mines, Inc.*, 13 Wn. (2d) 370, 384, 125 P.(2d) 668:

> "It is only in those cases where the writing fails to provide the answer to a question of meaning that the courts may look elsewhere for aid in construction. Where the terms are plain and unambiguous, the meaning of the contract is to be deduced from its language (17 CJS 695)."

That the arbitrator's authority was limited to answering the specific questions asked is evidenced by, in addition to the February 16 and March 13 stipulations, the following facts:

(a) Appellants' brief to the arbitrator stated at page 3:

> "As a result of these grievances, it is agreed by the 'stipulation to arbitrate' that specific questions presented by them are submitted for arbitration as follows:" (R. 82.)

(b) Various phases of the arbitration hearing itself, such as failure of all of the grievants to appear and failure to submit evidence as to relative ability, although a number of men were involved with respect to the specific positions sought. Certainly no ultimate job selection was involved in view of such lack of attendance and evidence failure (R. 40, 41, 82).

(c) The draft for the March 13 stipulation was submitted to appellant's counsel by letter (quoted herein at page 9) showing that both the February 16 stipulation and established practice of the parties required such a stipulation (R. 82-83).

(d) The parties by their stipulations had not taken away from the employer its reserved right to make the ultimate job selections, and this intent is further shown by the limited record and proof submitted to the arbitrator which furnished him no basis for making such ultimate job selection and other beneficial awards (R. 82).

At page 29 of their brief, appellants contend that, if the parties did not intend for arbitrator Ross to select the proper men for the positions in the event he found a contract violation, there would be no purpose in waiting to see what positions had been filled by the arbitrator. This is patently a non-sequitur. The April 24, 1962, letter agreement is clearly a recognition that, if the arbitrator found that the company had in some way proceeded improperly in the selections involved in the questions submitted to him, then the entire selection process, including that relating to the men listed in the April 24 letter, would

have to be reconsidered by appellee in the light of the affirmative or negative answers given by arbitrator Ross to the questions submitted to him.

The gratuitous statements included in the appellants' brief at pages 27-28 are irrelevant as there could be no issue under the arbitration except the issues submitted by the March 13 stipulation itself. The statement by counsel for the appellee, cited at page 28 of appellants' brief, is consistent with the position of the appellee on its motion for summary judgment, as obviously the arbitration would lead either to an approval of the appellee's selections or the making of new ones by the appellee in accordance with the appellee's right to make such selections as guaranteed by the labor contract.

2. *No Material Issue of Fact Existed as to Whether Appellee Had Waived the Limitations Which Were Placed Upon the Arbitrator's Authority*

The rule is that waiver can be manifested only by actions inconsistent with any other intention than to waive. This rule is expressed in *Caterpillar Tractor Co. v. Collins Machinery Co.*, 286 F.(2d) 446, 451 (9th Cir. 1960), where this court stated:

> "Waiver is an intentional and voluntary relinquishment of a known right. *O'Connor v. Tesdale*, 1949, 34 Wash.(2d) 259, 263, 209 P.(2d) 274, 276. It may be manifested by actions, but such actions must be inconsistent with any other intention than to waive. *Bowman v. Webster*, 1954, 44 Wn.(2d) 667, 669

> P.(2d) 960, 961. The mere fact that the other party is mistakenly led to believe there's been a waiver is not enough unless that party relies thereon to his detriment, in which case there's an estoppel. There is no evidence of any detrimental reliance by appellant, so the only question is whether appellee conducted himself in a manner inconsistent with any other intention than to waive."

Appellee did not conduct itself in a manner inconsistent with any other intention than to waive. Appellee refused to carry out the award in the particulars claimed to be outside the jurisdiction of the arbitrator as set forth in its motion for summary judgment, and therefore clearly gave notice that it did not believe that the award was a lawful, enforceable award. It was never necessary to take this position with the arbitrator as the parties had no notice of the portions of the award to which objection was made until the award was issued.

At the conference on July 18, 1962, the arbitrator stated that he found that the company had violated the agreement in the selection of men for the new jobs and then asked the parties to attempt to negotiate an agreement as to the filling of the new positions, in order to terminate the entire controversy. The parties did attempt such negotiation but were not able to reach an agreement. This is evidenced by the award itself in which the arbitrator stated:

> "It was my purpose to encourage *an agreed upon settlement of the dispute;* * * * *. (R-13) (emphasis supplied)

These negotiations having failed, the arbitrator was informed of this and that it was therefore necessary that

he proceed to decide the matter freed from any of the previous negotiations. The negotiations for an agreed placement of men having failed, and the decision being issued without further contact with the arbitrator, there was no notice that the arbitrator was going to do other than answer the questions submitted to him (R. 81).

With respect to the negotiations for an overall disposition of the entire matter, another phase of the matter must be clearly understood. The grievances attached to the March 13 stipulation did not cover all of the grievances filed with respect to the selection by appellee of employees for new positions in the Blooming and Finishing Mills. The letter agreement of April 24, 1962, held in abeyance the grievances regarding selection of employees for new positions in the Finishing Mill. One reason why the arbitrator's decision could not take the form which it did is that the claims of the men listed in this letter agreement also had to be later considered. Although the arbitrator was informed prior to his decision of the existence of this agreement and a copy furnished to him, it was felt that since his award placed men in the Finishing Mill, in the very positions which the parties had agreed would be separately considered, that he must have overlooked this matter and therefore the motion for reconsideration on this point was filed. It was felt that this motion was certainly well taken in view of this letter agreement and that favorable action on it would narrow the issue which would have to be submitted when the award was called in question as it was by appellee's motion for summary judgment. Appellee's counsel informed

the arbitrator that on second thought it had been the company's purpose to widen its motion as stated in appellee's motion for summary judgment herein so that he would have an opportunity to review his claim of jurisdiction but that, since the matter was taken into court before the company had an opportunity to do this, such a revised motion did not seem to be in order (R. 84-85).

Assuming for purposes of argument that appellants were mistakenly led to believe that there had been a waiver, there is in this case no evidence of detrimental reliance. The arbitrator orally announced that the appellee company had violated the contract in the selection of men for the new jobs (R. 80). He then sought "to encourage an agreed upon settlement of the dispute" (R. 13). The language that the parties agreed to assist the arbitrator "in formulating the award" is that of the appellant and not the arbitrator (Appellant's Brief, page 31). Appellee can not be estopped to assert its rights because it entered into negotiations to reach an agreed upon settlement of the dispute between the parties.

CONCLUSIONS

The conclusions to be drawn from the foregoing is that:

(a) The March 13 stipulation limited the authority of the arbitrator to answering the specific questions asked;

(b) No material issue of fact was created or raised by the labor contract, grievances, stipulations or contemporaneous documents and statements of the parties; and

(c) No material issue of fact existed as to whether ap-

pellee waived the limitations which were placed upon the arbitrator's authority.

Therefore, the District Court's entry of summary judgment for appellee should be affirmed.

Respectfully submitted,

DeWitt Williams
Robert H. Lorentzen
Attorneys for Appellee

Rosling, Williams, Lanza & Kastner
1440 Washington Building
Seattle 1, Washington
June, 1963

APPENDIX A

United States District Court
Western District of Washington
Northern Division

United Steelworkers of America, AFL-CIO, and Local No. 6 of the United Steelworkers of America, AFL-CIO, *Plaintiffs,* v. Northwest Steel Rolling Mills, Inc., a corporation, *Defendant.*	No. 5712 **Memorandum Decision**

In this case plaintiff seeks to establish the validity of an arbitrator's award and to enforce the same. Defendant moves the Court to enter summary judgment adjudging that certain portions of the award are invalid and unenforcible because they exceed the authority conferred upon the arbitrator by the terms of the submission.

Plaintiff predicates relief solely upon Section 2, Article XI, of the basic labor agreement between the parties which provides in the event that a grievance shall not have been satisfactorily settled by the union and the company, the case in question with all records pertaining thereto can then be appealed to an arbitrator to be appointed by mutual agreement who shall render a decision in line with the written terms of the labor agreement and said decision shall be final.

The parties did not submit the grievances to arbitration pursuant to the specific terms of the aforesaid provision of their labor agreement but prepared and signed a written

stipulation to arbitrate dated March 13, 1962. The stipulation was executed on behalf of each party by its attorney, and the authority of the attorneys to so stipulate on behalf of the parties has not been challenged and is not in issue.

The stipulation recites—

> "The matters submitted for arbitration involve the 'Grievances,' copies of which are attached hereto." (Underscoring supplied.)

It then recites the name of the arbitrator, following which it provides "The questions submitted for arbitration are as follows," and thereafter lists five specific questions.

The manner of submission adopted by the parties was in accordance with a stipulation executed by them on February 16, 1962, in connection with the dismissal of an action then pending between them in the Superior Court of the State of Washington for King County, which provided that separate arbitration stipulations shall be submitted to each of several named arbitrators listing the issues to be considered and determined by them. Assuming arguendo, however, that the plaintiff was at liberty to have submitted the grievances involved directly to the arbitrator, it chose to follow a different course.

The first paragraph of the stipulation to arbitrate does not recite that the matters submitted for arbitration *are* the "Grievances," copies of which are attached hereto, but uses the word "involve." The stipulation is free from ambiguity and means simply that the five specific questions submitted for arbitration arise out of the "Grievances" attached.

Counsel for plaintiff has made it clear that he relies on the aforesaid provision of the labor agreement and that there are no other agreements or understandings between the parties oral or in writing, other than the stipulation to arbitrate under discussion.

It appearing to the Court that the stipulation to arbitrate was the free and voluntary act of the parties, that it is clear and unambiguous and that it specifically sets forth the questions submitted for arbitration, it is valid and binding upon the parties.

The arbitrator was conscious of the authority conferred upon him by the stipulation for he recites in his award the questions submitted for arbitration in the identical language appearing in the stipulation. In his award, however, he goes beyond the authority conferred upon him in the stipulation for the reason, as stated by him, that it is well established at law that an arbitrator has authority to fashion an award which will fairly and equitably remedy the violations which have occurred.

It is the opinion of the Court that the arbitrator had no power or authority to do anything except to give an affirmative or negative answer to the questions posed. The award does find that the company's actions violated the basic agreement and that the grievances of Earl Stockman and Jack Perfrement are timely. The Court construes these findings to be an affirmative answer to questions 1 to 4, inclusive, and an affirmative answer to question 5, set forth in the stipulation to arbitrate. Any finding or award of the arbitrator in addition thereto was in

excess of the authority extended to him and hence invalid and unenforcible. Accordingly, defendant's motion for summary judgment is granted.

Defendant may prepare an order based upon this memorandum for presentation to the Court at 9:30 A.M., December 10, 1962.

DATED this 29th day of November, 1962.

W. T. BEEKS,
United States District Judge

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

.....

ROBERT N. LORENTZEN,
An Attorney for Appellee.